TENAGA NASIONAL BHD

v.

LTO INJECTION SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
TEO SAY ENG JC
[CIVIL SUIT NO: 22NCVC-180-05-2012]
12 JULY 2013

UTILITIES: *Electricity - Usage - Allegation of tampering with electricity meter - Consumption of lesser electricity than usual recorded - Whether plaintiff entitled to recover loss of revenue - Whether prima facie evidence under s. 38(4) Electricity Supply Act 1990 rebutted - Whether computation of consumption of electricity based on back billing method questionable - Whether reasonable doubt created in relation to computation of electricity*

TORT: *Defamation - Defences - Letter of demand alleging tampering of electricity meter - Whether letter of demand published maliciously - Whether letter of demand defamatory - Whether plaintiff protected by defence of justification - Electricity Supply Act 1990, ss. 37(1), 38(3) & (4)*

The plaintiff carried out an inspection at the defendant's factory and found that the electric meter and the electrical installation had been tampered with. The result of the tests carried out showed a short fall in the meter recordings of -4.07% as a result of the tampering. The amount of usage of electricity not recorded for the period between 7 January 2008 and 1 June 2011 was RM290,489.29. As such, the plaintiff sent a notice of demand and claimed for loss of revenue amounting to RM290,489.29 under s. 38 of the Electricity Supply Act 1990 ('ES Act'). The defendant averred that: (i) the method used by the plaintiff to record the tampering was crude and inaccurate; (ii) even if there was tampering of the meter, the plaintiff had failed to prove the quantum of the loss claimed; (iii) since there was no conviction, the plaintiff could not succeed on any claim under s. 38 of the ES Act; and (iv) the pleaded case was not based on history of the usage but based on the results of inspection carried out by the plaintiff. Therefore, the defendant contended that any evidence on computations based on history of usage should be rejected and counterclaimed for general and exemplary damages on the ground that the letters of demand were defamatory of the defendant. However, the plaintiff denied the statement of defence and counter claim and argued that it was protected by the defence of justification. The issues that arose for the court's determination were: (a) whether the electric meter in the factory premises of the defendant had been tampered with; (b) whether the plaintiff had

adduced *prima facie* evidence of the payment that had to be made by the defendant under s. 38(3) and s. 38(4) of the ES Act; and (c) whether the *prima facie* evidence under s. 38(4) of the ES Act had been rebutted by the defendant.

Held (dismissing plaintiff's claim and defendant's counter claim):

(1) There was no necessity for a consumer to be convicted of an offence under s. 37(1), (3) or (14) before TNB could recover loss of revenue. The finding of physical evidence of tampering was sufficient to constitute an offence punishable under s. 37(1) of the ES Act. Although there was no direct evidence that the tampering was done by the defendant, a reasonable inference could be drawn that the tampering was done by the defendant because the meter and installation were located within the defendant's factory premises and the tampering would benefit the defendant and not an outsider. (paras 18, 25 & 26)

(2) *Prima facie* evidence is defined as evidence which if accepted appeared to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. As a general rule, the plaintiff must prove its claim on the exact loss of revenue because of the tampering. The plaintiff may rely on s. 38(4) of the ES Act to prove *prima facie* evidence of the payment that had to be made under s. 38(3) of the ES Act. To invoke s. 38(4) of the ES Act, it could be in any written statement duly certified by the licensee or any person authorised by the licensee stating the amount of the loss of revenue and the person liable for the payment. By issuing the letter of demand, the plaintiff had complied with s. 38(4) of the ES Act. As such, the letter of demand constituted a *prima facie* evidence of the payment that had to be made by the defendant. (paras 28-31, 34 & 35)

(3) The back billing document was fraught with inconsistencies and contradictions. The computation of consumption of electricity based on back billing method was also questionable. As such, the *prima facie* evidence under s. 38(4) of the ES Act had been rebutted by the defendant. Although the rebuttal evidence adduced had created reasonable doubt on the equipment used and the method of computation of electricity, it had not rebutted the finding that the meter and the installation had been physically tampered with. (paras 41 & 42)

(4) The plaintiff's computation on the amount due was based on history of usage. This was a clear departure from the method of computation pleaded in the statement of claim. Thus, the plaintiff's claim should fail. Even if the court were to accept the computation

based on history of usage, the computation which was based on a computer print out which was not marked as an exhibit was also questionable and should be rejected. (paras 47-49)

(5) The defendant's counterclaim that the plaintiff had defamed it had no merit. The plaintiff was protected by the defence of justification. Further, the defendant had also failed to adduce sufficient evidence to prove that the plaintiff had published the two notices of demand maliciously. (para 62)

Case(s) referred to:
MAE Sdn Bhd & Ors v. Perwira Habib Bank Malaysia Bhd, Kuala Terengganu [1999] 4 CLJ 709 HC ***(refd)***
Taiwan Chief Precision Technology Sdn Bhd v. Tenaga Nasional Berhad [2014] 4 CLJ 23 CA ***(refd)***
Tenaga Nasional Berhad v. Medicplas Industries Sdn Bhd [2011] 1 LNS 1410 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(3), (4), (5)
Licensee Supply Regulations 1990, reg. 11(2)
Rules of Court 2012, O. 20 r. 9

Other source(s) referred to:
Cross on Evidence, 2nd edn, p 24
Sarkar on Evidence, p 45

For the plaintiff - Marliana Tagimin; M/s Zainul Rijal Talha & Amir
For the defendant - Ng Chew Hor; M/s Ng, Fan & Assocs

Reported by Sandra Gabriel

JUDGMENT

Teo Say Eng JC:

Plaintiff's Case

[1] The plaintiff, the supplier of electricity is a public listed company incorporated under the Companies Act 1965.

[2] The defendant a private limited company is a registered consumer of the plaintiff having a consumer account No. 034500697335-00 at premises No. 4, Jalan Bukit 3, Kawasan Perindustrian Miel, Seri Alam, 81750 Masai Johor.

[3] The plaintiff's claim is premised on s. 38 of the Electricity Supply Act 1990 (hereinafter to be referred to as ES Act) for loss of revenue amounting to RM290,489.29 arising from the tampering of the electricity meter on the defendant's factory premises.

Facts Of The Case

[4] On 14 June 2011, the plaintiff through its staff had carried out an inspection at the defendant's factory and found that the electric meter and the electrical installation had been tampered with. The plaintiff carried out repairs and corrections on the said installations.

[5] From the tests carried out, the plaintiff discovered that the electricity meter failed to record the actual usage of electricity at the premises of the defendant's factory as a result of the tampering.

[6] The result of the tests carried out shows a short fall in the meter recordings of -4.07% as a result of the tampering.

[7] Based on the results of the said inspection, the plaintiff did the calculation and found that the amount of usage of electricity not recorded for the period between 7 January 2008 and 1 June 2011 was RM290,489.29.

[8] The plaintiff then sent a notice of demand dated 31 December 2012 through its solicitors Abdul Aziz Rahim & Co claiming for loss of revenue amounting to RM290,489.29 arising from the tampering of the electric meter on the defendant's factory premises.

The Defence

[9] The main contentions of the defendant are:

(a) There was no tampering of the plaintiff's meter on the electrical installation.

(b) There is no proof that the meter did not correctly capture the electricity consumed:

(i) The plaintiff used the wrong instrument to carry out the tests.

(ii) The clamp meter has a margin of error of 1.5% to 5% which has not been noted in the Borang Pemeriksaan P6.

(iii) The method used by PW1 and his colleagues was crude and inaccurate by counting and expecting two persons to take the reading and to take the photographs using two cameras at exactly the same moment.

(c) Even if on the assumption that there was tampering of the meter, the plaintiff had failed to prove the quantum of the loss claimed that is, RM290,489.29.

(d) Since there was no conviction the plaintiff cannot succeed on any claim under s. 38 of the ES Act.

(e) The failure of the defendant to amend the statement of claim in relation to the period of "7 Januari 2008 hingga 11 Ogos 2008" to "7 Januari 2008 hingga 1 Jun 2011" meant that the plaintiff is bound by the original pleadings.

(f) The pleaded case of the plaintiff is not based on history of the usage but based on the results of inspection carried out by TNB. Therefore any evidence on computations based on history of usage should be rejected.

Defendant's Counterclaim

[10] The defendant claims that there was no proof of tampering or theft of any electricity by the defendant.

[11] The defendant submits that the letters dated 5 December 2011 and 31 Januari 2012 are clearly defamatory of the defendant as what was stated in the two letters meant:

(a) The defendant is dishonest;

(b) The defendant had done something dishonest and/or cheating;

(c) The defendant had carried out theft;

(d) The defendant had committed an offence against the law; and/or

(e) The defendant is a person who does not pay his debts.

[12] The defendant is claiming general and exemplary damages for the sum of RM200,000 and costs and interest.

Plaintiff's Reply To The Statement Of Defence And Counterclaim

[13] Basically, the plaintiff denies the statement of defence and counterclaim. The plaintiff pleads that it has evidence to prove that the electric meter and the electrical installation at the defendant's factory premises had been tampered with and the two notices dated 5 December 2011 and 31 January 2012 respectively are notices of demand for payment for loss of revenue arising from the tampering issued in pursuant to the Electricity Supply Act 1990. The plaintiff further pleads that the contents of both the notices are true and are in fact the results

of the inspection of the electric meter and the electrical installation at the defendant's factory premises carried out by its staff. In the circumstances, the plaintiff is protected by the defence of justification.

Issue For Determination

Whether The Electric Meter In The Factory Premises Of The Defendant Had Been Tampered With

[14] The plaintiff's claim for loss of revenue of RM290,489.29 is premised on s. 38 of the ES Act.

Section 38 of the Act provides:

(1) Where any person employed by a licensee finds upon any premises evidence which in his opinion provides that an offence has been committed under s. 37(1), 37(3), or 37(14), the licensee or any person duly authorized by the licensee may, upon giving not less than 24 hours notice, in such form as may be prescribed, cause the supply of electricity to the disconnected from the said premises.

(1A) …

(2) …

(2A) …

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under s. 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying:

(a) The amount of loss of revenue or the expenses incurred by the license; and

(b) The person liable for the payment thereof shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection(3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil in a court.

[15] Under s. 38(3) the plaintiff may require the consumer that is, the defendant to pay it for the loss of revenue due to the offence committed

under s. 37(1) that is the offence of tampering and any expenses incurred by the plaintiff under the section including the expenses incurred in respect of the reconnection of electricity supply. A

[16] In order to require the defendant to pay for the loss of revenue the plaintiff must prove that the loss of revenue was due to the offence committed that is, the offence of tampering. B

[17] The words 'offence committed' in s. 38(1) has been interpreted by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 to mean the subjective finding of its employee if any offence has been found committed under s. 37(1), s. 37(3) or s. 37(14) and does not mean there ought to be a finding of guilt and conviction under s. 37(1) or s. 37(3) or s. 37(14) of the ES Act. C

[18] It is now settled law that there is no necessity for a consumer to be convicted of an offence in s. 37(1), (3) or (14) before TNB can recover loss of revenue due to the offence committed under s. 37(1), (3) or (14). However, there must be a subjective finding that an offence has been found committed under s. 37(1), (3) or (14). D

[19] In the case before us, the court has to determine whether there was a subjective finding by the TNB staff that an offence of tampering had been committed. E

[20] The word 'tampering' has been defined by *Collins Cobuild English Dictionary New Edition* to mean "If someone tampers with something, they interfere with it or try to change it when they have no right to do so". F

[21] Section 37 provides that "any person who tampers with ... any installation or part thereof ... shall be guilty of an offence".

[22] The plaintiff has adduced the following evidence to establish the findings by the TNB staff that the offence of tampering had taken place at the defendant's factory premises on the date of inspection: G

(a) PW1 has testified that:

> (i) Semasa pemeriksaan dilakukan saya mendapati bahawa terdapat pengusikan pada pemasangan meter iaitu Sil Panel CT dan Terminal CT adalah palsu, rujukan di muka surat 22 lkatan Dokumen Plaintif yang menunjukkan is adalah palsu. Saya juga mendapati bahawa 1x wayar halus digunakan untuk memintas S1 & S2 di terminal CT pada ketiga-tiga fasa Red, Yellow & Blue menyebabkan meter tidak merekodkan bacaan yang betul – rujukan di muka surat 23 hingga 30 lkatan Dokumen Plaintif. H I

A (2) Sil Terminal Meter yang asal mempunyai cop mohor TNB. Alat yang digunakan untuk memasang Sil Terminal Meter tersebut akan mewujudkan suatu tanda TNB pada Sil Meter tersebut. Alat yang digunakan tersebut hanya boleh didapati daripada TNB sahaja dan tidak boleh didapati di mana-mana kedai dan sil yang baru tiada cop tersebut.

B (3) Sil Terminal adalah palsu menunjukkan telah berlakunya pengusikan. Sil Terminal Meter adalah amat sensitif dan sekiranya cubaan untuk membukanya, ianya akan menimbulkan kesan yang senang untuk dikenalpasti.

C **[23]** However the defendant has adduced evidence *vide* DW3, a director of the defendant company that the defendant or its staff did not at any time tamper with the plaintiff's meter or panel or other electrical installation or used a wire to bypass the connections in order to steal electricity from the plaintiff's supply. The defendant further argues that D it is not logical for the defendant to have tampered with meter in its own factory premises in the manner alleged by the plaintiff as the false seals as admitted by PW1 would have been detected by any staff of the plaintiff. Despite the staff of the plaintiff having visited the defendant's factory 39 times between 10 August 2007 and 26 May 2011 the plaintiff E did not detect any tampering.

[24] Therefore the plaintiff's pleaded case that the defendant had tampered with the meter and installations between 7 February 2008 and 1 June 2011 could not be true as any tampering would have been seen by the naked eyes of those officers of the plaintiff.

F

[25] Having considered the evidence adduced by both the parties, I am satisfied that the plaintiff had established through PW1 and his team that there was physical evidence that the electric meter and installation at the defendant's factory premises had been tampered with and that finding of G the physical evidence of tampering is sufficient to constitute an offence punishable under s. 37(1) of the Act.

[26] Although there was no direct evidence that the tampering was done by the defendant or its staff, a reasonable inference could be drawn that the tampering was done by the defendant or its staff for two H reasons, first the meter and installation were located within the defendant's factory premises where outsider will usually have no access to the premises, secondly, the tampering would only benefit the user that is the defendant and no one else and it would be illogical and unreasonable for an outsider to come and tamper with a TNB meter I which would not benefit them in any way.

[27] I am satisfied with the finding of PW1 of the physical tampering of the meter and the installation in the defendant's factory premises on the day of their inspection on 14 June 2011. I am of the considered view that the fact that the alleged tampering could have been detected easily and was not detected by the plaintiff during their visits prior 14 June 2011 will not cast any doubt on the finding of tampering by PW1 on 14 June 2011 unless there is evidence to show that PW1 and his team were acting maliciously against the defendant. From the evidence adduced, I find that SP1 and its team were merely carrying out their routine inspection of the meter at the defendant's factory. I do not have any reason to doubt what he and his team had testified in court regarding the findings of the physical evidence of the tampering of the meter in the absence of evidence to the contrary that they had malice or grudges against the defendant.

Whether The Plaintiff Had Adduced Prima Facie Evidence Of The Payment That Has To Be Made By The Defendant Under s. 38(3), s. 38(4) Of The ES Act

[28] '*Prima facie* evidence' has been defined by *Sarkar on Evidence* at p. 45 as 'evidence which if accepted appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive': See *Words, Phrases & Maxims – Legally & Judicially Defined* 12P, Q LexisNexis.

[29] As a general rule, the plaintiff must prove its claim on the exact loss of revenue because of the tampering. The claim cannot be based on proof of estimates.

[30] However the plaintiff may rely on s. 38(4) to prove *prima facie* evidence of the payment that has to be made under s. 38(3) of the Act upon the compliance of the requirements laid down in s. 38(4) of the ES Act.

[31] To invoke s. 38(4), I agree that the Act does not prescribe any form of written statement. It can be in any written statement duly certified by the licensee or any person authorised by the licensee stating the amount of the loss of revenue and the person liable for the payment thereof (see the Court of Appeal decision in Rayuan Sivil No. W-02(NCVC) 102-01/2012 *Tenaga Nasional Berhad v. Medicplas Industries Sdn Bhd* [2011] 1 LNS 1410).

[32] The plaintiff has tendered a written statement that is, exh. P12 duly certified by PW3 (Ramesh a/l Thangaveloo) an employee of TNB specifying the amount claimed that is RM290,489.

[33] The plaintiff has also issued a notice of demand dated 5 December 2011 requesting the defendant to pay up the amount claimed that is RM290,489.29 within 14 days from the date of the notice of demand and if the defendant failed to settle the amount due, the plaintiff will take legal action to recover the loss of revenue claimed and costs.

[34] Having construed the letter of demand dated 5 December 2011 issued by the plaintiff to the defendant (not disputed by the defendant) and the written statement exh. P12, I am satisfied that the requirements under s. 38(4) of the ES Act have been complied with.

[35] In the circumstances I find that the letter of demand together with P12 constitute *prima facie* evidence of the payment that has to be made by the defendant.

Whether The Prima Facie Evidence Under S. 38(4) Had Been Rebutted By The Defendant

[36] The *prima facie* evidence established by the plaintiff is not conclusive and can be rebutted by acceptable evidence to the contrary (see *Sarkar on Evidence* at p. 45 and *Cross on Evidence* 2nd edn. at p. 24). The rebuttal evidence can take the form of evidence elicited from the plaintiff's witnesses or even evidence adduced by the defendant itself: Mahkamah Rayuan R.S. J-02(NCVC)-3148-12/2011 (*Taiwan Chief Precision Technology Sdn Bhd v. Tenaga Nasional Berhad* [2014] 4 CLJ 23).

[37] The main attacks levelled against the plaintiff's *prima facie* evidence on the amount due that is RM290,489.29 are as follows:

[38] Borang Pemeriksaan P6 was not reliable:

(i) PW1 had carried out a test by clamp meter showing that there was a short fall of -4.07% of the electricity consumed as a result of tampering. However the Instruction Manual Digital Clamp Meter for model KEW 2003A tendered by the defendant through its expert DW1 as exh. D15 states that the said clamp meter had a marginal error of 1.5% to 5%. Yet PW1 failed to take into account the margin error of 1.5% to 5% of the clamp meter. The said margin error was not noted in the 'Borang Pemeriksaan' P6.

(ii) The results obtained from the tests by SP1 as reflected in the Borang Pemeriksaan (P6) was wrong as the meter reading was higher than the CT reading. Since PW1 told the court that it was impossible for the meter reading to be higher than the busbar/CT reading, so the results obtained have cast doubts as to whether clamp meter used for the test was accurate.

(iii) DW1, an expert in the area of electricity, electrical engineering and related matters told the court that he had visited the defendant's factory and saw four plastic injection moulding machines and some auxiliary equipment such as air compressor, dryer and other electrical loads. The electricity consumed by each machine fluctuated greatly from low to very high within a short period of time. He personally conducted the measurement. Given such large electricity fluctuations within a short period, DW1 is of the view that it can present difficulty in obtaining accurate meter readings. It is especially so if the measurements are done using slow acting instruments such as clamp meters. Moreover if the readings are obtained *via* human intervention it becomes error prone.

Ruling By The Court

[39] I agree with the contention of the defendant that since there was no explanation forthcoming from PW1 on the above two allegations, coupled with the opinion of DW1 that the use of the clamp meters in the measurement of the consumption of electricity by the four plastic injection moulding machines could present difficulty in obtaining accurate meter readings, I am doubtful whether the clamp meter used for the test was accurate.

Back Billing Document P12

[40] The defendant attacked the reliability of the back billing document – P12 on the following grounds:

(i) The back billing method of calculation does not take into account the results of inspection by the PW1 which shows a short fall -4.07% of the usage of electricity.

(ii) They had in their calculation used: a higher unit charge of RM0.408 and a higher power factor (1.00 and 0.95). For instance (A) the power factor used by TNB in calculation of bill was 0.85 but P12 shows that plaintiff used a power factor of 1.00 and 0.95 instead of 0.85 in their calculation of the bills. (B) The plaintiff had used a higher unit price to calculate the actual usage of electricity:

(a) As for the unit charges that is the unit price for each "kwh" consumed, PW2 and PW3 said in their examination-in-chief that they had used the unit price/rate of tariff of 0.348 in their calculations. (See Q&A No. 16 to PWS2 and Q&A No. 16 to PWS3).

(b) This contradicted their own evidence in their examination-in-chief when they said the unit price/rate tariff of 0.372 was used. (See Q&A No. 18 to PWS2 and Q&A No. 18 to PWS3).

(c) Be that as it may, if one looks at p. 5 of bundle B (P12), for example on 1 April 2009, the following can be deduced:

(1) Bil Serahan is RM27,096.10;

(2) KWH is 66,412;

(3) Thus for one KWH, the price was:

$$\frac{\text{RM27,096.100}}{\text{66,412-00}} = \text{RM0-408}$$

(4) Jumlah bil sebenar is RM42,971.91;

(5) KWH is 105,523.32;

(6) Thus for one KWH, the price was:

$$\frac{\text{RM42,971-91}}{\text{105,323-32}} = \text{RM0-408}$$

(d) However, the actual applicable unit price for 1 April 2009 is shown on the bill sent to the defendant, at p. 46 of bundle C (D26) and the unit price was RM0.397 only and not RM0.408.

(e) This meant that the plaintiff had used a higher unit price in their computation.

(iii) Back billing does not reflect that TNB had taken into account factors like breakdown of machineries, stoppage for maintenance or repairs, holiday shut down, TNB supply interruption, inconsistent orders affecting production capacity, product moulds change over etc.

Ruling By Court

[41] I agree with the submission of the defendant that the back billing document P12 was fraught with inconsistencies and contradictions. For the above reasons, I find that the borang pemeriksaan is not reliable and the computation of consumption of electricity based on back billing method is also questionable. I therefore find that the *prima facie* evidence under s. 38(4) has been rebutted by the defendant.

[42] However although the rebuttal evidence adduced has created reasonable doubt on the equipment used by TNB and the method of computation of electricity it has not rebutted the finding by PW1 that the meter and the installation had been physically tampered with.

The Issue On The Plaintiff's Pleaded Case

[43] The defendant submits that the computation on the amount due and owing based on the history of usage should be rejected.

[44] The defendant points out that the pleaded case of the plaintiff is not based on historical usage but based on the inspection and the results of the inspection that there was a shortfall of -4.07% of the usage of electricity as a result of tampering. But the evidence adduced through PW2 and PW3 that their calculations had nothing to do with the tests on 14 June 2011 and the computations were based on the history of usage at p. 7 of bundle B. The defendant submits that the court cannot therefore displace the pleaded case and found that the defendant liable on a matter not pleaded. Furthermore p. 7 of bundle has not been marked as an exhibit and does not constitute evidence to be considered by the court.

[45] Since the method of calculation which was based on historical usage is not pleaded, that method should not be allowed to be relied upon in proving their claim against the defendant.

Ruling By Court

[46] Having perused the statement of claim, I find it is indeed the pleaded case of the plaintiff that the computation carried out by the plaintiff was based on the test carried out by its staff.

[47] It is clear from the evidence adduced in court by the plaintiff that its computation on the amount due was based on history of usage.

[48] This is a clear departure from the method of computation pleaded in the statement of claim. I am of the considered view that the plaintiff's claim should fail on this ground alone.

[49] Even if the court were to accept the computation based on history of usage, I find that the computation which is based on a computer print out at p. 7 of bundle B which is not marked as an exhibit is also questionable and should be rejected.

Regulation 11(2) Licensee Supply Regulations 1990

[50] The defendant submits that the plaintiff can only claim for a period of three months under reg. 11(2) of the Licensee Supply Regulations 1990. I shall produce reg. 11(2) of the Regulations 1990 below for convenience:

[51] Regulation 11(2) reads as follows:

(2) The reading of the consumers meter shall be *prima facie* evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:

(a) Meter inaccuracy;

(b) Malfunctioning of the meter or its associated installation or part thereof;

(c) Incorrect meter reading;

(d) Incorrect application of a meter multiplying constant;

(e) Cross-connection of installation to different account; or

(f) Faulty installation,

the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

Ruling By Court

[52] Having perused the reg. 11(2) I am of the view that such a contention is unsustainable since reg. 11(2) Licensee Supply Regulations 1990 is not applicable to a case of meter tampering that is an offence under s. 37(1) Electricity Supply Act and the claim for loss of revenue arising therefrom.

[53] It is clear that undercharging due to tampering does not fall under reg. 11(2) of the Regulation 1990. The plaintiff's claim in this case which is premised on s. 38 of the Electricity Supply Act for loss of revenue due to tampering is not limited to three months of back billing.

Decision

[54] For the above reasons I find that the plaintiff has failed to prove its claim on the balance of probabilities against the defendant. I therefore dismiss the plaintiff's claim against the defendant.

[55] Alternatively, the plaintiff's claim should also fail on the ground that although leave has been granted to allow the plaintiff to amend its Statement of Claim on the period on which the whole claim was based that is, from "7 January 2008 to 11 August 2008" to "7 January 2008

to 1 June 2011" the amended Statement of Claim has not been filed. The order granting leave had therefore lapsed: See *MAE Sdn Bhd & Ors v. Perwira Habib Bank Malaysia Bhd, Kuala Terengganu* [1999] 4 CLJ 709; [2000] 5 MLJ 204; O. 20 r. 9 of the Rules of Court 2012. That means to say that the whole claim is based on the period "7 January 2008 to 11 August 2008". The back billing document P12 clearly shows that there were no discrepancies on the usage of electricity from 7.1.2008 to 11.8.2008 and this fact was not disputed by the plaintiff. Based on this ground alone the plaintiff's claim should fail.

Counterclaim

[56] The defendant submits that the plaintiff had defamed the defendant by the publication of two letters of demand dated 5 December 2011 exh. D31 and 31 January 2012 exh. D33 accusing the defendant of meter tampering and theft of electricity.

[57] Having read the contents of the two letters, I am of the considered view that the contents of the first letter dated 5 December 2011 exh. D31) merely states the fact that the meter had been tampered with but did not accuse the defendant of tampering or theft of the electricity. I find that the letter D31 is a letter of demand for payment of loss of revenue as a result of tampering of the meter.

[58] The notice of demand was issued for the recovery of the loss of revenue as a result of tampering in pursuant to s. 38(5) of the ES Act. I therefore hold that its content are not defamatory.

[59] As regards the second letter that is the notice of demand dated 31 January 2012, I find that the second paragraph of D33 had indeed accused the defendant of stealing the electricity resulting in the plaintiff losing the revenue. I shall produce the second paragraph below for convenience:

> Kami telah diarahkan oleh anak guam kami bahawa setelah siasatan dilakukan pada 14 Jun 2011 dan telah dibuktikan pihak tuan sebagai pengguna telah melakukan kesalahan kecurian arus dan akibat perbuatan kecurian arus yang telah dilakukan oleh pihak tuan tersebut maka pihak anak guam kami telah mengalami kerugian.

[60] I find that such accusation of theft if not proven is defamatory of the defendant and could tarnish the reputation and goodwill of the defendant.

[61] From the evidence adduced by the plaintiff, I find that the plaintiff had proved that the electric meter had been tampered with in the premises of the defendant's factory and a reasonable inference could be drawn that it was the defendant which committed the tampering for two

A reasons: one is that the meter was located within the defendant's factory premises which is under the care and control of the defendant and no one else; secondly the tampering of the meter would not benefit anyone except the defendant.

B **[62]** Since the plaintiff had stated the truth or the substantial truth of tampering of the meter which had taken place in the defendant's factory premises, it is protected by the defence of justification as rightly pleaded in its reply to the statement of defence and counterclaim. Furthermore the defendant had also failed to adduce sufficient evidence to prove that the plaintiff had published D33 maliciously.

C

[63] For the above reasons, I find that the defendant had failed to prove its case on defamation and I therefore dismissed its counterclaim. I also order no cost to be paid by either party to the suit.

D **[64]** For completeness on the claim for damages, on the assumption that the defendant had succeeded in proving that the impugned words in D33 were defamatory, having taken into account that the defendant being a private limited company, the mode and extent of the publication, the absence of any retraction or apology from the plaintiff, a global sum of RM150,000 is a reasonable award for both general and exemplary damages.

E

F

G

H

I